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CHARLES ELMORE CRO
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 504

EASTERN AIR TRANSPORT, INC., COMPLAINANT, APPELLANT,

vs.

SOUTH CAROLINA TAX COMMISSION AND W. G. QUERY, J. P. DERHAM AND FRANK C. ROBINSON, AS MEMBERS OF SOUTH CAROLINA TAX COMMISSION, RESPONDENTS, APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF SOUTH CAROLINA.

BRIEF ON BEHALF OF APPELLANT.

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Washington, D. C.;
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Eastern Air Transport, Inc., v. South Carolina Tax Commission, 52 Fed. (2d) 456 (Adv. Sheets 9, 1931).

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF SOUTH CAROLINA.

BRIEF ON BEHALF OF APPELLANT.

This is an appeal from the United States District Court for the Eastern District of South Carolina, three judges sitting, convened pursuant to Section 266 of the Judicial Code. The appellant (complainant in the

Court below) sought an interlocutory injunction to e
join and restrain the South Carolina Tax Commissio
from collecting a tax of six cents per gallon upon gas
line purchased by appellant in the State of South Car
lina, and used by it exclusively in interstate air com
merce, upon the ground that the State laws imposin
such tax were unconstitutional, in so far as applied
appellant's interstate air transportation, being in co
flict with the provisions of Article 1, Section 8, Clau
3, of the Constitution of the United States. The Cou
below denied an interlocutory injunction. Its opinio
is reported in *Eastern Air Transport, Inc.* v. *Sou
Carolina Tax Commission et al.*, 52 Fed. (2d) 456 (A
vance Sheets of November 9th, 1931).

Statement of the Case.

Eastern Air Transport, Inc., is a corporation o
ganized and existing under the laws of the State
Delaware, and is engaged in the transportation of pa
sengers exclusively by airplanes between Newa
(N. J.) airport and Miami, Florida, and in additio
United States mail between Newark, N. J., and oth
points, under contract with the Post Office Departmen
with stops at intermediate points. Weather permi
ting, appellant operates daily, into and out of the Sta
of South Carolina, eight airplanes, carrying passenge
and United States mail. In the State of South Car
lina its airplanes stop only at the cities of Greenvill
Spartanburg, Florence and Charleston. Its entire bus
ness in South Carolina is practically interstate in cha
acter, since it transports no passengers or freight b

tween the South Carolina cities, and has only on infrequent occasions transported at the request of the Post Office Department between those South Carolina cities a small amount of mail, but even as to that, such transportation was in an airplane engaged in an interstate flight (R. 16 *et seq.*).

The propulsion power for appellant's airplanes is produced by internal combustion engines or motors in which the fuel used is gasoline of a very "high test" type, and which is unsuitable for use in automobile engines (R. 17).

Because of the state of the art of flying, and present type of airplane construction, it is impossible for an airplane to make the flight from Newark to Miami, or even a much shorter flight, without refueling at intermediate points. The necessities of appellant's transportation instrumentalities require it, therefore, to fuel in the State of South Carolina, for without so doing, it could not complete its flight or carry the United States mail as required by its contract with the Post Office Department (R. 17).

The laws of South Carolina (see Appendix "A") impose a tax "equal to six (6) cents per gallon on all gasoline * * * sold or consigned, used, shipped or distributed for the purpose of sale within" the State. The tax is imposed upon the seller, but in fact is passed along to the purchaser, and all of such tax is remitted by the seller to the State tax authorities and used solely for State and County highways (R. 39, 40).

Appellant has paid this tax on all gasoline purchased in the State, and has never been able to purchase gaso-

line in South Carolina except upon its payment. The amount paid is "$5000 or more a year" (R. 14, 17, 40).

The Assigned Errors to Be Urged.

The first two assigned errors, Nos. I and II, relate to facts and they will be briefly disposed of (R. 43, 44).

Assignments Nos. III, IV, V and VI relate to the District Court's conclusions of law, and each of them will be urged (R. 44, 45).

Assignments Nos. VII and VIII relate to the Court's refusal to grant the requested relief, and will be urged (R. 45).

These assignments will be considered in the order stated, but assignments Nos. III, IV, V and VI, and assignments Nos. VII and VIII will be treated together.

ARGUMENT.

The Court's "findings of fact" will be considered first, and its "conclusions of law" thereafter.

Assignment of Error No. "I".

We have little fault to find with the Court's interpretation of the facts, but in two respects we think the Court erred, and while in neither of these is the vital legal principle involved affected, we do think it proper to call them to this Court's notice.

The Court should have found as a fact that appellant could not conduct its interstate air transportation business without purchasing gasoline in South Carolina (R. 17). In carrying the United States mail its planes stop in South Carolina (R. 16) and its flying opera-

tions can not be carried out without refueling its airplanes in that State (R. 17).

Assignment of Error No. "II",

The Court found that "the maintenance of the public roads of the State is important to the carrying on of complainant's business" because they facilitate "its business and increases its patronage." Such a general statement could probably be correctly made with respect to any and all business carried on in South Carolina, but in this case it is only a general deduction or assumption, for there is not in the record one iota of evidence that good roads in South Carolina add a single passenger, or an additional pound of mail to appellant's business.

Assignments Nos. "III", "IV", "V", and "VI".

These assignments relate to the Court's "Conclusions of Law". It seems unnecessary to treat them separately, for they are all incident to, or express in different ways, the legal error of the Court, namely, its refusal to hold the South Carolina gas tax law unconstitutional as applied to appellant's interstate air business.

Article I, Section 8, Clause 3 of the Constitution of the United States provides that the Congress shall have power "To regulate commerce with foreign nations, and among the several States, and with the Indian Tribes." It was early said by Chief Justice Marshall in *Brown* v. *Maryland*, 12 Wheaton 419, that a State law imposing a tax may be a form of "regula-

tion" of commerce among the States. The principle that a State tax law may regulate commerce among the several States, and hence be repugnant to the Constitution, has never since *Brown* v. *Maryland* been seriously challenged. The difficulty arises in the application of the principle.

A review of the decisions of this Court leads to certain conclusions, viz: a State tax which is a direct burden—as distinguished from an incidental burden; or a State tax which though "indirect" nevertheless imposes an "undue" burden upon interstate commerce, or which discriminates against interstate commerce, are all repugnant to the Commerce clause of the Constitution. On the other hand, there are certain taxes, e. g., a property tax, which under certain circumstances are not repugnant to the Constitution even though they may in effect burden interstate commerce. The general principle has been stated by this Court, speaking through the late Justice Harlan, in *Western Union Telegraph Company* v. *Kansas*, 216 U. S. 1, 27, as follows:

> "If the statute, reasonably interpreted, either directly or by its necessary operation, burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business."

Bearing this rule in mind and as a prerequisite to a discussion of the main question the first inquiry would seem to be

The Nature of the South Carolina Tax.

The South Carolina law imposes the tax upon "every oil company, person, firm or corporation doing domestic or intrastate business within this State, and engaging in the business of selling, consigning, using, shipping, or distributing for the purpose of sale within this State, any gasoline * * * etc." The seller is required to make a monthly report of sales under oath to the South Carolina Tax Commission and to remit the amount of the tax shown by such report.

The State law is denominated in the act itself "License Tax on Dealers in Gasoline", while the Supreme Court of South Carolina in *Gregg Dyeing Company* v. *South Carolina Tax Commission*,* — S. E. —, held it to be an "excise tax". The District Court recognized it as an excise tax, but proceeded to treat it as a property tax, wherein it erred, as will be later on pointed out.

The opinion in *Gregg Dyeing Company* v. *South Carolina Tax Commission* reviews the legislative history of the State's gas tax laws, and says:

> "The tax here imposed is an excise tax and not a property tax."

It is true that in that case the Court had before it the Act of 1930 relating to taxes upon gasoline imported into the State, but in its opinion it discusses and

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* This case not yet reported, but the Court's opinion appears in the record in *Gregg Dyeing Company, Petitioner*, v. *W. G. Query et al.*, October Term, 1931, No. 170.

treats as a whole the several State gas tax laws including that one under consideration here, and we think the Court in the above-quoted language referred to the State gas tax laws taken as a whole.

The highest Court of South Carolina declares the tax to be an "excise" tax, which under the public policy of the State of South Carolina rests upon the consumer—"the burden actually rests upon the ultimate consumer" says the Court. The facts show that the tax is passed along to appellant and must be paid before it can purchase gasoline in South Carolina, which result is quite in accord with similar taxes, as this Court has held in *Texas Company* v. *Brown*, 258 U. S. 466, and *Panhandle Oil Company* v. *Mississippi*, 277 U. S. 218.

The tax involved being an "excise" tax, it becomes unnecessary to discuss property and other forms of taxes as they may affect interstate commerce. For, as Mr. Justice Brandeis says in his dissenting opinion in *Texas Transport and Terminal Company* v. *City of New Orleans*, 264 U. S. 150, 155:

> "The validity of a State tax under the Commerce clause does not depend upon its character or classification. It is not void merely because it affects or burdens interstate commerce. The tax is void only if it directly burdens such commerce, or (where the burden is indirect) if the tax discriminates against or obstructs interstate commerce."

The Burden on Appellant.

Since it is the public policy of South Carolina for the burden of the tax to rest upon the ultimate consumer,

and since the tax is in fact paid by the ultimate consumer, and since appellant cannot buy gasoline in South Carolina without paying the tax, the "practical effect of enforcement" (quoting from *Panhandle Oil Company* v. *Mississippi, supra*) is the same as if the law in so many words laid the tax on the ultimate consumer. Indeed the laying of the tax on the seller is little more than was suggested by this Court in *Indian Motocycle Co.* v. *United States,* 283 U. S. 570, as "a comprehensive and convenient mode of reaching all first or initial sales", in other words of collecting the tax. Certainly the "practical effect of enforcement" upon the appellant is the same as if the tax were laid directly upon it, while the actual burden upon appellant as found by the Court below "amounts to $5,000 per year or more."

It is not the language of the law, but its operation and effect as enforced, which controls. Mr. Chief Justice Hughes points this out in *Kansas City Ry.* v. *Kansas,* 240 U. S. 227, 231,

> "And, further, in determining whether a tax has such a direct relation to interstate commerce as to be an exercise of power prohibited by the commerce clause, our decision must regard the substance of the exaction—its operation and effect as enforced—and cannot depend upon the manner in which the taxing scheme has been characterized."

It needs little imagination to perceive that such a burden in one State, if repeated in other States through which appellant must operate its airplanes under its

contract to carry the mails of the United States, would soon become so heavy as to be prohibitive.

The Burden of the Tax, Though Imposed Upon the Seller by Law, Falls Upon the Consumer, and Such Burden is a Direct Burden.

We think this proposition so thoroughly sustained by three very recent decisions of this Court that it is unnecessary to cite further authority.

In *Texas Company* v. *Brown*, 258 U. S. 466, this Court had before it a combined inspection and revenue law of the State of Georgia, the amount of fees to be paid to be determined by the amount of petroleum products to be inspected. In the opinion the Court said at p. 479:

> "The tax, to describe it according to its essential nature, is an excise upon domestic sale or storage, designed to affect the use of the products—a tax imposed at the time of inspection, the inspector acting also as tax gatherer; inspection and tax payment required but once and that, ordinarily, from the dealer at the time of the first domestic sale or during storage preliminary to such sale. The self interest of the dealer and the customs of trade are relied upon to add the tax to the price of the product, and thus pass it on to the ultimate consumer—a method appropriate in indirect taxation and certainly a not unreasonable mode of distributing the burden among those who share in the benefits.
>
> "That the legislature intended the effect of the tax to fall upon the ultimate consumer is evident, not only from the obviously inevitable result of requiring its payment, ordinarily, by the

first domestic seller, but from the specific provisions of the amendatory act of 1913, that the 1912 Act 'shall apply not only to gasolines, benzins, and naphthas sold or offered for sale in the State of Georgia, but likewise to all such commodities that may be sold elsewhere and brought into the State of Georgia, for consumption or use.'"

A more recent decision of this Court to the same effect, is *Panhandle Oil Company* v. *Mississippi*, 277 U. S. 218. In that case the Mississippi statute provided that any person engaged in the business of distributing gasoline, or retail dealer in gasoline, should pay an excise tax upon the sale of gasoline, except that sold in interstate commerce or imported for personal use.

The question as to the constitutionality of the statute arose on the sale of gasoline to the United States Coast Guard Fleet and the United States Veterans Hospital. The State of Mississippi sued the distributor for the tax on sales made to the Coast Guard and hospital and the distributor defended, on the ground that the tax was a direct tax against the purchaser, and was unconstitutional as imposing a substantial burden upon an instrumentality of the United States Government. This Court held that it was a direct tax against the purchaser, and was a substantial burden upon the Government in carrying on a constitutional governmental function and, therefore, void. In the opinion the Court said:

"The validity of the taxes claimed is to be determined by the practical effect of enforce-

ment in respect of sales of (sic) the Government. *Wagner* v. *Covington*, 251 U. S. 95, 102, 64 L. Ed., 157, 167, 40 S. C. Rep. 93. A charge at the prescribed rate is made on account of every gallon acquired by the United States. It is immaterial that the seller and not the purchaser is required to report and make payment to the State. Sale and purchase constitute a transaction by which the tax is measured and on which the burden rests. The amount of money claimed by the State rises and falls precisely as does the quantity of gasoline so secured by the Government. It depends immediately upon the number of gallons. The necessary operation of these enactments when so construed is directly to retard, impede and burden the exertion by the United States, of its constitutional powers to operate the fleet and hospital. (Citing cases.) To use the number of gallons sold the United States as a measure of the privilege tax is in substance and legal effect to tax the sale (citing cases), and that is to tax the United States—to exact tribute on its transactions and apply the same to the support of the State.

"The exactions demanded from petitioner infringe its right to have the constitutional independence of the United States in respect of such purchases remain untrammeled. (Citing cases.) Petitioner is not liable for the taxes claimed. Judgment reversed" (p. 222).

The third case is *Indian Motocycle Company* v. *United States*, 283 U. S. 570, which is directly in point as sustaining complainant's position in this case, that the tax is upon the ultimate consumer. In that case plaintiff sold a motorcycle to the City of Westfield, Massa-

chusetts, for use in its police department. A tax in respect of the sale was assessed and collected from plaintiff under Section 600 of the Revenue Act of 1924, which provides that there "shall be levied, assessed, collected and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentage of the price for which so sold or leased." Motorcycles are among the articles mentioned. Manufacturers, producers and importers are required to make returns of their sales and to pay the tax.

The Court construed this section of the Act to place an excise tax on the sale of the article and said:

> "Counsel for the Government base their contention on the requirement that the tax be paid by 'the manufacturer, producer or importer' but we think this requirement is intended to be no more than a comprehensive and convenient mode of reaching all first or initial sales, and that it does not reflect a purpose to base the tax in any way on manufacture, production or importation" (p. 574).

To the foregoing there may be added *Gregg Dyeing Company* v. *Tax Commission, supra,* wherein the Supreme Court of South Carolina, in construing the several State gasoline tax laws, said:

> "Statutes of this nature have been uniformly construed as imposing a tax on the ultimate consumer or user * * *."

and again

> "The public policy of the State of South Carolina, as expressed in this Legislation, taking it

as a whole, is that all consumers shall pay the gallonage tax of six cents."

The Decision of the District Court.

Since the Court below had before it all the cases cited in this brief, and reached a conclusion which we submit is wrong, it seems necessary to discuss its opinion.

Circuit Judge Parker, speaking for the Court below, said: "We attach no importance to the fact that the tax is described in the statute as a privilege or license tax; for, where such tax is measured by sales, it is in effect a sales tax, whatever it may be called." After declaring it "not a property tax within the meaning of the South Carolina Constitution, but an excise tax" (citing *Gregg Dyeing Company* v. *Tax Commission*) he proceeds to treat it as a property tax, and devotes a part of the opinion to a discussion based upon the "property tax" idea. It seems, therefore, unnecessary to discuss further this phase of the opinion.

The Court's decision is based:

> "* * * on the fact that the sale by which the tax is measured is not a transaction in interstate commerce, and that the gasoline sold does not become an instrumentality of such commerce until after the sale is complete * * *" (p. 460).

This we construe to mean that sale and subsequent use are separate and distinct acts, having no more relation to each other than if performed by different persons, at different times, and without regard to each other. But such, of course, is not the fact, nor the re-

sult. Moreover the Court quite overlooks the fact that the burden of the tax "actually rests upon the ultimate consumer". *Gregg Dyeing Co.* v. *Tax Commission, supra.* A State cannot tax instrumentalities of interstate commerce or their use—as we shall show later—wherefore, it must follow that a tax intended to fall upon and which does fall upon the ultimate consumer or user, has precisely the same effect as if laid upon use rather than sale. There can be no use without a previous sale, or purchase. The one leads to the other.

In seeking to treat "sale" as separate and distinct from subsequent use, the Court below overlooks the principle decided by this Court in such cases as *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, and *Shafer* v. *Farmers Grain Co.*, 268 U. S. 189. These cases relate to State laws, which, in brief, required grain buyers to purchase and pay for a license before engaging in the buying of grain. The statutes were challenged on the ground of their repugnance to the Commerce clause of the Constitution as to grain bought for shipment in interstate commerce. This Court, in holding the State laws unconstitutional, treated the act of buying—though performed wholly within a State—as a part of the interstate transaction of shipment, Mr. Justice Van Devanter, saying in *Shafer* v. *Farmers Grain Co., supra*, at p. 198, "Buying for shipment, and shipping, to markets in other States, when conducted as before shown, constitutes interstate commerce—the buying being as much a part of it as the shipping." Without going into the details of the manner in which the busi-

ness was transacted it seems sufficient to quote again from the same case at p. 195;

> "All buy with the purpose of shipping to and selling in terminal markets outside the State, and carry out this purpose in the manner already described."

In other words, there was a regular and established business of buying grain in one State for shipment to another State, and the grain so bought was shipped in interstate commerce. The analogy to the present case is, we submit, exact. Here the appellant buys a special type of gasoline intended for use in airplanes; it intends to use that gasoline, and does in fact use it, only in airplanes engaged exclusively in interstate commerce. A course of business in which the seller and buyer necessarily know the use to which the gasoline will be put is not like the case of a sale of a commodity which may or may not be shipped in interstate commerce, and which is sold and bought without regard to its subsequent use.

But the Court below, in seeking to separate the sale from use, does exactly what Mr. Justice Day in *Lemke* v. *Farmers Grain Co., supra,* at p. 58, says cannot be done. To quote his words:

> "Nor will it do to say that the State law acts before the interstate transaction begins. It seizes upon the grain and controls its purchase at the beginning of interstate commerce. *Pennsylvania R. Co.* v. *Clark Bros. Coal Min. Co.*, 238 U. S. 456, 468, 59 L. Ed. 1406, 1411, 35 Sup. Ct. Rep. 896."

The purchase is a mere "incident" in the course of regular and consistent interstate business, or as the late Chief Justice Taft put it in *Board of Trade* v. *Olsen*, 262 U. S. 1, 35:

> "It (*i. e.*, *Swift & Co.* v. *United States*, 196 U. S. 375) refused to permit local incidents of great interstate movement, which, taken alone, were intrastate, to characterize the movement as such."

If, therefore, the sale in this case standing alone would be an intrastate transaction, it nevertheless ceases to be such when it becomes a mere incident in a great interstate movement, such as appellant's business is shown to be. *Stafford* v. *Wallace*, 258 U. S. 495.

The exigencies of a trade determine what is essential to the business or process of interstate commerce in that trade. *Thames & Mersey Insurance Co.* v. *United States*, 237 U. S. 19. It is impossible for appellant to conduct its interstate business into and out of the State of South Carolina without refueling its planes in that State with gasoline which it must buy therein. The purchase of gasoline in South Carolina is just as indispensable to the uninterrupted conduct of appellant's interstate business as the sales at the Chicago stock y rds—which *per se* were local transactions but were held by the Court in *Stafford* v. *Wallace*, *supra*, to be so intimately associated with interstate commerce as to be a part thereof—were essential to the continuity of the flow of cattle from the ranges in the west to the markets in the east. The State of South Carolina, therefore, had no power to tax these sales,

just as in *Norfolk & Western Railroad Co.* v. *Pennsylvania,* 136 U. S. 114, 120, the State of Pennsylvania could not impose a license tax upon a railroad company engaged in interstate commerce for the privilege of maintaining an office in the State. As the Court there said "that office was maintained because of the necessities of the interstate business of the company, and for no other purpose. A tax upon it, therefore, was a tax upon one of the means or instrumentalities of the company's interstate commerce; and as such was in violation of the commercial clause of the Constitution of the United States".

The Court below has, we submit, failed to grasp the true principle of *Panhandle Oil Co.* v. *Mississippi,* 277 U. S. 218, and *Indian Motocycle Co.* v. *United States,* 283 U. S. 570. The former involved the Mississippi State tax on gasoline purchased by the United States for Coast Guard cutters and hospitals, and the latter the United States sales tax on motorcycles purchased by the City of Westfield. As to those cases the Court below said: "In the case of a sale to the Federal Government or a State, it is the character of one of the parties to the transaction which exempts it from taxation." *It is not the character of the purchaser which exempts the transaction from taxation, but the character of the use of the article purchased,* which brings about the exemption.

In the *Panhandle case* Mr. Justice Butler particularly pointed out that "The United States is empowered by the Constitution to maintain and operate the fleet and hospital". In other words, the gasoline

was bought to be used in carrying on a governmental function. To quote further:

> "While Mississippi may impose charges upon petitioner for the privilege of carrying on trade that is subject to the power of the State, it may not lay any tax upon transactions by which the United States secures the things desired for its *governmental purposes.*" (Italics ours.)
>
> * * * * * * *
>
> "The necessary operation of these enactments when so construed is directly to retard, impede and burden the exertion by the United States, of its *constitutional* powers to operate the fleet and hospital." (Italics ours.) (pp. 221, 222.)

In the *Indian Motocycle case,* the articles purchased were "for use by the city in its police service", and it is perfectly clear from the Court's opinion that the exemption resulted not from the mere fact of purchase by a municipal corporation, but from the fact of the governmental use to which the articles were put. It must follow, we think, that, had the *use* not been a governmental one in either of the above cases, the *character* of the purchaser, standing alone would not have brought about exemption. *South Carolina* v. *United States,* 199 U. S. 437.

If then it is the *use* to which the article purchased is put, and not the *character* of the purchaser, which produces exemption from taxation, it must follow that a tax upon a sale becomes a tax upon use, since the use which brings about the exemption comes into existence only *after* the sale.

The exemption of the United States from taxation in the *Panhandle Oil case* comes about because the United States was performing a governmental function provided for by the Constitution; in the present case appellant's interstate commerce business is likewise protected from burdens by a provision of the Constitution. The burden upon the use by the United States of gasoline in its Public Health Service was measured by a tax on its sale or purchase; the burden upon appellant's interstate business is equally measured by a tax upon the number of gallons of gasoline purchased. Under the Mississippi statute and under the South Carolina statute the tax is collected at the time of the sale. In the *Panhandle case* the tax was collected at the time of the sale but the exemption, as we have pointed out, results not from the fact that the United States was the purchaser, but from the fact that the United States purchased in order that it might perform a governmental function which it was authorized under the Constitution to do. The analogy to this case is exact. Even though the tax is collected at the time of the sale on an article intended to be used, and which in fact is used, in interstate commerce, the resulting burden is exactly the same as if the tax was not imposed until the gasoline was actually used in appellant's aircraft. Were the gasoline in this case being purchased and used in intrastate commerce, it would be subject to tax just as would the motorcycles purchased by the City of Westfield have been subject to tax had they not been intended for use, and actually used, by that municipality in performing a govern-

mental function, and just exactly, we submit, as would have been the fact in the *Panhandle case* had the gasoline there purchased by the United States been intended for use and actually used in some non-governmental activity.

That an event subsequent to a sale may convert the sale into an interstate transaction is decided by this Court in *Federal Trade Commission* v. *Pacific States Paper Trade Association*, 273 U. S. 52. There the question was "whether the sale by the wholesaler to the retailer in the same State is a part of interstate commerce where, subsequently at the instance of the seller and to perform his part of the contract, the paper is shipped from a mill in another State to or for the retailer." Speaking through Mr. Justice Butler the Court said at p. 64:

> "And what is or is not interstate commerce is to be determined upon a broad consideration of the substance of the whole transaction. *Dozier* v. *Alabama*, 218 U. S. 124, 128, 54 L. Ed. 965, 967, 28 L. R. A. (N. S.) 264, 30 Sup. Ct. Rep. 649. Such commerce is not confined to transportation, but comprehends all commercial intercourse between different States and all the component parts of that intercourse. *And it includes the buying and selling of commodities for shipment from one State to another. Dahnke-Walker Mill. Co.* v. *Bondurant*, 257 U. S. 282, 290, 66 L. Ed. 239, 243, 42 Sup. Ct. Rep. 106; *Lemke* v. *Farmers' Grain Co.*, 258 U. S. 50, 55, 66 L. Ed. 458, 462, 42 Sup. Ct. Rep. 244. The absence of contractual relation between the manufacturer and retailer does not matter. *The sale by the wholesaler to*

> when the retailer is the initial step in the business completed by the interstate transportation and delivery of the paper. Presumably the seller has then determined whether his source of supply is a mill within or one without the State. If the contract of sale provided for shipment to the purchaser from a mill outside the State, then undoubtedly it would be an essential part of commerce among the States. *Sonneborn Bros.* v. *Cureton* (*Sonneborn Bros.* v. *Keeling*), 262 U. S. 506, 515, 67 L. Ed. 1095, 1100, 43 Sup. Ct. Rep. 643. Clearly the absence of such a provision does not affect the substance of the matter when in fact such a shipment was contemplated and made. *Cf. Dozier* v. *Alabama, supra; Western U. Teleg. Co.* v. *Foster*, 247 U. S. 105, 113, 62 L. Ed. 1006, 1015, 1 A. L. R. 1278, P. U. R. 1918D, 865, 38 Sup. Ct. Rep. 438; *Lemke* v. *Farmers Grain Co., supra*, 55 [66 L. Ed. 462, 42 Sup. Ct. Rep. 244]. The election of the seller to have the shipment made from a mill outside the State makes the transaction one in commerce among the States. And on these facts the sale by jobber to retailer is a part of that commerce." (Italics ours.)

It will be observed that at the time of the sale the paper might be supplied from a mill within or without the State, but when supplied from the latter and shipped into the State in interstate commerce, despite the interval of time which might elapse between the sale and the shipment, the sale itself became a part of an interstate transaction, thus we think demonstrating the fallacy of the reasoning of the Court below that the sale is not a transaction in interstate commerce be-

cause the gas sold only becomes an instrumentality of interstate commerce *after* the sale is complete. We submit that as appellant's business is conducted use in interstate commerce after the sale relates back to the sale, and makes the sale a part of an interstate transaction.

We submit that there is no difference in principle between "buying and selling commodities for shipment from one State to another," and buying gasoline in one State to be used as fuel in an interstate air journey.

Since it is the use to which the article is put which determines exemption, it would seem to follow that the Court below erred in separating use and sale, and holding the South Carolina law constitutional on the theory that the gasoline does not become an instrumentality of interstate commerce until after the sale is complete. Sale and use are just as inseparable in this case as they were in the *Panhandle case* and in the *Indian Motocycle case.*

The Court again erred, we respectfully submit, in its interpretation of the case of *Helson* v. *Kentucky*, 279 U. S. 245. In that case a ferry boat engaged in interstate commerce between the States of Kentucky and Illinois purchased in Illinois all of the gasoline used to produce its motive power. Seventy-five per cent of the gasoline was consumed within the limits of Kentucky, and that State sought to collect a tax from the ferry company under a State law which imposed a tax of three cents a gallon on all gasoline sold within the State, the word "sold" being by the statute made to include "use" within the State. Mr. Justice Sutherland, speaking for the Court, said at p. 252:

> "The tax is exacted as the price of the privilege of using an instrumentality of interstate commerce. It reasonably cannot be distinguished from a tax for using a locomotive or a car employed in such commerce. A tax laid upon the use of the ferryboat would present an exact parallel. And is not the fuel consumed in propelling the boat an instrumentality of commerce no less than the boat itself? A tax which falls directly upon the use of one of the means by which commerce is carried on directly burdens that commerce. If a tax cannot be laid by a State upon the interstate transportation of the subjects of commerce, as this Court definitely has held, it is little more than repetition to say that such a tax cannot be laid upon the use of a medium by which such transportation is effected."

The Court below said, at p. 459:

> "The question of the right of Kentucky to tax sales of gasoline intended for use in interstate commerce was not involved. The question was the right of that State to tax the use in interstate commerce of gasoline purchased in another State. It was held that the State was without power to tax the use of an instrumentality of interstate commerce, which is manifestly a very different question from that involved in the right of a State to tax the sale within its borders of an article designed by the purchaser for use in interstate commerce."

The District Court, we think, has placed too narrow a construction upon this Court's decision in *Helson* v. *Kentucky*. We submit that this Court did not intend

to limit its decision to "use" merely, but on the contrary by its approval of the language of Mr. Justice Field in *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U. S. 196, 214, to wit: "all restraints by exactions in the form of taxes upon such transportation, or upon acts necessary to its completion, are so many invasions of the exclusive power of Congress to regulate that portion of commerce between the States", clearly indicated that a restraint, whether by way of a tax upon "use" or a tax upon a sale for use, where the former is "necessary to its completion", is an unlawful burden upon interstate commerce.

If the Court is right in its view of *Helson* v. *Kentucky,* and this Court has decided nothing more than the District Court asserts that it did, nevertheless we submit that, even under such interpretation of that case, the South Carolina law in its practical operation is unconstitutional as to this appellant's interstate air transportation. We have shown we think that the tax is intended to fall upon and does fall upon the consumer; that in its practical operation this is equivalent to a use tax since there can be no use without the payment of the tax. It would, therefore, seem to follow that, even under the very narrowest interpretation given to the principle decided in *Helson* v. *Kentucky,* that principle covers the facts of this case.

Applying Mr. Justice Butler's language in *Panhandle Oil Company* v. *Mississippi, supra,* the State "may not lay any tax upon transactions by which the United States secures the things desired for its governmental functions," does it not follow that the tax here is upon a transaction whereby the appellant secures

the things necessary for conducting its interstate commerce operations? The constitutional provision, empowering the United States to maintain and operate the fleet and hospital, is of no greater dignity than the constitutional provision whereby Congress regulates commerce among the States; if under the Constitution a State "may not lay any tax upon transactions by which the United States secures the things desired for its governmental purposes", it must follow equally that a State may not lay any tax upon a like transaction essential to interstate commerce and equally protected by the Constitution. As previously pointed out, the practical effect in this case is that the burden upon appellant's interstate commerce is exactly the same whether the tax be laid upon use or sale.

The District Court's restricted views in this case as to what is interstate commerce show a very marked departure from its broad views expressed in its somewhat earlier decision in *Station WBT, Inc.* v. *Poulnot*, 46 Fed. (2d) 671. In that case the Court had before it a law of the State of South Carolina imposing a tax upon radio receiving sets, which tax was in the nature of a license tax for the privilege of using them. Station WBT, broadcasting from Charlotte, North Carolina, sought and obtained an injunction restraining the enforcement and collection of the tax, not because any portion of the tax fell upon it, but because the payment of the tax by radio receiving set owners in the State of South Carolina would tend to cut down their number, thus decreasing the audience who might "listen in" to broadcasting from Station WBT and thereby lessen the amount received from advertisers

"seeking to reach the South Carolina audience exclusively". The Court held that communication by radio constituted interstate commerce; that the tax was not a property tax *but a license tax* for the privilege of using an instrumentality of interstate commerce; that the tax was laid directly upon a necessary instrument of interstate commerce and that the law imposing it, therefore, conflicted with the Constitution of the United States and was void. This conclusion was reached despite the fact that no part of the tax was paid by Station WBT. We respectfully suggest that, even though the sending of broadcasting programs from one State to another comes within the category of interstate commerce, nevertheless the burden imposed by the South Carolina law in so far as it affected Station WBT—not the owners of receiving sets who paid the tax but were not parties to the proceeding—was extremely remote and indirect on Station WBT's interstate business compared to the burden upon appellant's interstate business.

The District Court in its opinion failed to advert to certain language of the South Carolina law which we think has a most important bearing on this case. We refer to that portion of Section 1 of the statute which reads: "that every oil company, person, firm or corporation *doing domestic or intrastate business within this State* * * *." (Italics ours.) Since the burden of the tax falls upon the consumer, and since it is the policy of the State of South Carolina that it should fall upon the consumer, it would seem to follow that, if the consumer be engaged in interstate business and not in "domestic or intrastate business", the provi-

sions of the act are not applicable to such interstate business. Or, putting it another way: the policy of the State of South Carolina requires that the nature of the consumer's, i. e. the taxpayer's, business be considered, and if that business be not "domestic or intrastate", the law is not intended to apply, for its very terms indicate a clear purpose not to burden an interstate business.

The view which we place upon *Helson* v. *Kentucky, supra,* is the same as is placed upon it by the majority of Circuit and District Courts which have passed upon this subject since the decision in that case.

In *United States Airways, Inc.* v. *Shaw,* 43 Fed. (2d) 148, a statutory Three Judge Court, sitting for the Western District of Oklahoma, in construing the gas tax law of that State, granted a perpetual injunction against its collection, basing its decision upon *Helson* v. *Kentucky.* It is true that the Court, in referring to the Oklahoma statute, says that it levied a tax "on all gasoline consumed in the State", but it appears from the facts that United States Airways, Inc., *bought* its gasoline largely in Oklahoma and that the tax in question was borne by it in the price it paid to the consignees and distributors of the gasoline, so that obviously the tax was collected and paid at the time of purchase. Even though denominated a consumption tax, it was in fact a sales tax, and the Court held complainant entitled to a perpetual injunction "against the collection by the State of the tax upon gasoline they may hereafter *buy in the State for use in their combined interstate and intrastate transportation business*". (Italics ours.)

In *Mid-Continent Air Express* v. *Lujan*, 47 Fed. (2d) 266, a statutory Three-judge Court, sitting for the District of New Mexico, granted an injunction against the collection of the gas tax imposed by the laws of that State. The New Mexico law then under consideration contained two sections, one imposing a tax on consumption and the other on sale. It appears from the facts, as stated by the Court, that Mid-Continent Air Express Corporation purchased its gasoline at Albuquerque in New Mexico from a wholesale distributor, and that "such distributor collects from plaintiff five cents per gallon on each gallon of such gasoline on account of such excise tax, and remits such collections to the Comptroller." In other words, the facts actually being passed upon in that case related to sales. The Court there found no difficulty in holding that *Helson* v. *Kentucky* controlled, and granted an injunction against the collection "of such tax *on gasoline purchased by it for use in interstate commerce*". (Italics ours.)

In *Boeing Air Transport, Inc.*, v. *Edelman*, 51 Fed. (2d) 130, the Wyoming gas tax law was before the Court for the District of Wyoming. The Court based its decision on certain facts which are not existent in this case, but states that had the facts been the same as those in *Mid-Continent Air Express* v. *Lujan, supra*, and *United States Airways* v. *Shaw, supra*, it would have on the authority of those cases and *Helson* v. *Kentucky* reached a like conclusion.

As opposed to the foregoing decisions we have that of the Three-judge Court from which this appeal is

taken, and likewise the decision of a Three-judge Court for the Eastern District of Missouri in *Central Transfer Company* v. *Commercial Oil Company,* 45 Fed. (2d) 400. In that case Central Transfer Company, operating an interstate freight bus line between Missouri and Illinois, sought an injunction against the collection of the tax imposed by the Missouri law upon gasoline purchased by it in Missouri, and there, and elsewhere used. In referring to *Helson* v. *Kentucky, supra,* the Court takes the view that the decision in that case was limited solely to a tax upon "use". It is further apparent from the opinion that the Court was inclined to treat the tax as a property tax. It should also be pointed out that in that case Central Transfer Company operated buses over the highways of Missouri, which presents quite a different situation from appellant's operations in this case. The tax could probably have been sustained under the principle laid down by this Court in *Interstate Transit, Inc.,* v. *Dick Lindsey,* 283 U. S. 183. The tax in that case was not a gasoline tax, but was imposed upon concerns operating interstate motor buses, and was in the nature of a privilege tax of $500 a year "for each vehicle seating more than 20 and less than 30 passengers." Mr. Justice Brandeis pointed out that a tax "as compensation for the use of public highways, which is a fair contribution to the cost of constructing and maintaining them and of regulating the traffic thereon", might be imposed even though the motor vehicles were engaged exclusively in interstate commerce. As such a tax would be a direct burden on interstate commerce, it

could not be sustained "unless it appears affirmatively, in some way, that it is levied only as compensation for use of the highways or to defray the expense of regulating motor traffic."

Of course the appellant's airplanes do not use the highways of South Carolina and the suggestion in the opinion of the Court below that "the maintenance of the public roads is important to the carrying on of complainant's business, as such roads must be maintained to its airports for the benefit of its passengers," is a mere assumption on the part of the Court, since as pointed out there is no evidence in the record to indicate or to even suggest that good or better roads in the State of South Carolina added a single passenger to plaintiff's business or a single pound of mail. Perhaps it might be permitted to say, that experience does not prove that people travel by airplane, or are restrained from traveling by airplane, because the roads leading to an airport are good or bad; passenger air traffic is brought about by other considerations, more particularly by the convenience of the location of air terminals, and the time consumed in making a particular journey. It perhaps would be equally as appropriate to suggest, that persons placing airmail stamps upon their letters, do not stop to think whether the road leading to the airport from which the airplane carrying their letters will depart, is a good or a bad road.

Certainly the tendency of State legislation respecting gasoline tax laws leads to the conclusion that States recognize that where the gas tax is applied to the con-

struction and maintenance of the State highways, it is, to say the least, inequitable to exact a tax upon gasoline sold and which is not to be used upon a State highway, and the majority of States, even in their eagerness to secure revenue, have not sought to tax gasoline used in aircraft. See *United States Aviation Report*, 1930, "*Digest of State Gasoline Tax Laws*," page 514, from which it appears that in thirty-one States gasoline consumed elsewhere than on State highways, which of course includes gasoline used in aircraft, is either exempt from taxation, or the tax paid is refunded, and several States specifically exempt gasoline purchased for use in aircraft. To the list there set out should be added the State of New Mexico which recently enacted a law providing for a refund upon gas purchased and used for purposes "other than in motor vehicles operated or intended to be operated upon any of the public streets or highways in the State of New Mexico." Chapter 31 of the New Mexico Session Laws of 1931.

As the tax involved is an excise tax, there can be eliminated from discussion other forms of taxation affecting interstate commerce such as property taxes, taxes upon franchises, taxes measured on a property or capital stock basis, or taxes measured by net income, and the decisions relating to such taxes. Especially does it differ from a tax upon "net income", which in many instances is upheld, even though portions of such income be derived from interstate commerce, because here the tax must be paid even though there be no net income. The necessary operation of this stat-

ute is to tax appellant's gross receipts derived wholly from interstate commerce. This cannot be lawfully done. *New Jersey Bell Tel. Co.* v. *State Board of T. & A.*, 280 U. S. 338.

It is a tax collected at the time of sale and measured by the quantity of gasoline purchased; it is, therefore, identical with the tax considered in *Panhandle Oil Co.* v. *Mississippi, supra,* and *Indian Motocycle Company* v. *United States, supra.* The burden of the tax falls and is intended to fall upon the "ultimate consumer or user" (*Gregg Dyeing Co.* v. *Tax Commission, supra*) and that burden is identical whether the tax be upon use, or a sale followed by use. "The practical effect of enforcement" is that appellant's interstate transportation is burdened in South Carolina to the extent of "$5,000 or more" every year—a like burden in other States would soon make air transportation so costly as to be prohibitive. To say, under circumstances such as exist here, that a tax upon the "use" of gasoline in appellant's airplanes would be a burden upon interstate commerce, while the same tax required to be paid before the gasoline can be used, would not be such a burden, is to ignore the practical effect of enforcement in respect to sales to appellant. A tax upon "use", and a tax prior to use, which must be paid before there can be a "use", are for all practical purposes one and the same. The South Carolina gas tax simply means that appellant pays an additional sum in order that it may have the *privilege of using* gasoline bought in South Carolina, in its interstate airplane commerce.

We submit that in any aspect of the case the tax upon appellant is a direct and extremely substantial burden upon its interstate operations; that the Court below erred in failing to hold that the South Carolina law is void and unconstitutional as to gasoline bought by appellant for use in its interstate air commerce, and in denying the relief sought, and that its action in so doing should be reversed.

Respectfully submitted,

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APPENDIX "A".

Act of the General Assembly of the State of South Carolina, approved February 23, 1922 (South Carolina Acts 1922, pages 835-838), as amended by Act No. 146 of 1923, Act No. 731 of 1924, Act No. 34 of 1925, and Act No. 102 of 1929 (South Carolina Acts, 1929, pages 107-112), provides in part:

"SECTION 1. *License Tax on Dealers in Gasoline—Collection.*—Be it enacted by the General Assembly of the State of South Carolina: That every oil company, person, firm or corporation doing domestic or intrastate business within this State, and engaging in the business of selling, consigning, using, shipping, or distributing for the purpose of sale within this State, any gasoline or any substitute therefor, or combination thereof, for the privilege of carrying on such business shall be subject to the payment of a license tax, which tax shall be measured by and graduated in accordance with the volume of sales of such oil company within the State. Every such oil company shall pay to the State an amount of money equal to six (6) cents per gallon on all gasoline, combinations thereof, or substitutes therefor, sold or consigned, used, shipped or distributed for the purpose of sale within the State. That every oil company subject to the tax provided for in this Act shall, on or before the 20th day of each month, and every month, make out and file with the South Carolina Tax Commission a return under oath, in such form as may be prescribed by said South Carolina Tax Commission showing the number of gallons of gasoline, combinations thereof, or substitutes therefor, which have been sold or consigned, used, shipped or distributed for the purpose of sale within the State during the previous month and shall at the same time

remit to the State Treasurer the amount of the tax provided by this Act. And every such oil company shall keep a record, or records, showing all purchases and dispositions of all gasoline, combinations thereof, or substitutes therefor, and such records shall be at all times subject to inspection by any agent of the South Carolina Tax Commission or the Department of Agriculture, Commerce and Industry."

"SECTION 2. *Distribution of Proceeds.*—The license tax of six (6) cents per gallon on gasoline as herein levied and provided for shall be distributed as follows:

"Five (5c) cents on each gallon shall be turned over to the State Highway Department for the purposes of said Department and one (1c) cent per gallon shall be distributed to the Counties of the State to be used exclusively for the construction and maintenance of County roads, and the distribution of the one (1c) cent per gallon license tax among the Counties shall be on the same basis and by the same method as now provided by law for the distribution of the two (2c) cents gasoline tax formerly or heretofore distributed among the Counties."

"SECTION 3. *Use of Portion Allotted to State Highway Department.*—Out of the five (5c) cents gasoline tax herein allocated for the purposes of the State Highway Department, together with other current income or other funds of said Department, the State Highway Commission or Department shall make payments or reimbursements as follows:

"(*a*) The appraised value of any hard surfaced roads, or concrete bridges connecting with other States, now in the State Highway System constructed by any County or Counties either before or after the passage of Act No. 731, of the Acts of 1924, shall be reimbursed or paid to such County, reimbursements to be made on the basis of valuation for hard surfaced roads pro-

vided for in Section 3 of Act No. 731 of the Acts of 1924. Such reimbursements shall be made to such county in annual installments over the period of years ending in 1943. All unpaid obligations of the State Highway Commission coming under the provisions of this clause shall bear interest at the rate of four and one-half per centum per annum, payable semi-annually, or if any County shall have issued bonds for said paving, then interest shall be paid by said Highway Commission to such County at the rate borne by the bond of said County, such interest to be paid semi-annually. No payments shall be made under this clause for roads constructed under reimbursement agreements referred to in clause (*c*) of this Section.

"(*b*) The amounts which the State Highway Commission has or shall have by agreements made with Counties or highway or bridge districts since the passage of Act No. 731 of the Acts of 1924, or hereafter made, agreed to pay as reimbursement for constructing State highways, or for advancing money for said purposes shall be reimbursed or paid to such County or highway or bridge districts. All unpaid obligations of the State Highway Commission coming under the provisions of this clause shall bear interest at the rate borne by any bonds or other obligations issued by Counties or highway or bridge districts for the purpose of obtaining funds advanced and/or used for the construction of State highways. In any case where any County or highway or bridge district has advanced money to the State Highway Commission from sources other than from the sale of bonds or notes bearing a fixed rate of interest, the interest paid on such amounts shall be at the rate of four and one-half per centum per annum, payable annually. Payments of interest required by this Section to be made at the rate borne by bonds or other obligations shall be made at or be-

fore the times when the interest on said bonds or other obligations fall due. The interest required to be paid to Counties or highway or bridge districts under the provisions of this Section shall be computed from the date of approval of this Act by the Governor.

"(*c*) In any case where the portion of the gasoline tax which is required by laws enacted prior to this Act to be distributed to Counties has been lawfully pledged in whole or in part for, or is required by law to be applied, in whole or in part, to the payment of the principal and/or interest of any bonds or other obligations, the State Highway Commission shall pay said principal and/or interest at or before the times when said principal and/or interest become due. The payments and reimbursements required by this Section shall have priority over any other payments authorized or required by law to be made out of the gasoline tax or other current income of the State Highway Department."

"SECTION 4. *In Lieu of Former Tax.*—The license tax of six (6) cents per gallon on gasoline as herein levied and provided for shall be in lieu of the gasoline tax of five (5) cents per gallon heretofore levied, assessed and collected by law. All provisions of law now relating to the collection of the gasoline tax are hereby re-enacted."

* * * * * * *

"Approved the 16th day of March, A. D. 1929."